

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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JOSEPH GRANDE,

Plaintiff,

Civil Act. No: 1:11-cv-00777-SAS-JLC
ECF Case

v.

GRISTEDE'S FOODS, INC.; JOHN
CATSIMATIDIS,

Defendants.

-----X

**NOTICE OF RENEWED MOTION TO DISMISS
BY DEFENDANT GRISTEDE'S FOODS, INC.**

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Attorneys for Defendant Gristede's Foods, Inc.

Of Counsel:
Charles H. Kaplan (CK-5801)
William J. Brennan (WB-0742)

UNITED STATES DISTRICT COURT
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BY DEFENDANT GRISTEDE'S FOODS, INC.**

PLEASE TAKE NOTICE THAT, upon the Affirmation of Charles H. Kaplan, dated July 29, 2011, the memorandum of law dated July 29, 2011, any reply papers to any opposition papers served by Plaintiff Joseph Grande (“Grande”), and all prior proceedings, pleadings and other papers filed with the Court in the above-captioned action, Defendant Gristede's Foods, Inc. (“Gristede's”), by its attorneys Sedgwick LLP, will move this Court, before The Honorable Shira A. Scheindlin, United States District Judge, at the United States Courthouse, 500 Pearl Street, Courtroom 15C, on September 13, 2011, at 9:30 A.M. or as soon thereafter as counsel may be heard, for an order dismissing with prejudice Grande's Amended Complaint under Rule 12(b)(6) or Rule 41(b) of the Federal Rules of Civil Procedure, awarding Gristede's its reasonable attorneys' fees and court costs and disbursements incurred in connection with Grande's New York Labor Law § 740 claim, pursuant to New York Labor Law § 740(6), and granting Gristede's such other and further relief as this Court deems just and proper.

The Court should dismiss the Amended Complaint because:

- (1) On April 7, 2011, Grande filed with the Court a Voluntary Discontinuance of Count I of the Amended Complaint which stated that “Plaintiff hereby voluntarily discontinues and dismisses Count I of the Amended Complaint (NY Labor Law, § 740) with prejudice.” The Court signed the order dismissing Count I with prejudice on April 8, 2011.
- (2) The sole remaining count in the Amended Complaint, Count II, fails to state a claim upon which relief can be granted because the purportedly defamatory statement, when considered in context, was merely opinion and not a factual allegation of criminal conduct, and because the purportedly defamatory statement described, at most, only a nonactionable intent to commit a crime.
- (3) The case should be dismissed for failure to prosecute under Rule 41(b) due to Grande’s failure to (a) obtain new counsel despite the Court’s provision of more than three months to do so; and (b) appear at a required July 11, 2011 conference with the Court.

PLEASE TAKE FURTHER NOTICE that any opposing affidavits and memoranda must be served by August 19, 2011, and any reply affidavits and memoranda must be served by September 6, 2011, pursuant to the Court’s orders at a July 11, 2011 conference.

The undersigned certifies that he sent a pre-motion letter to Plaintiff’s counsel in connection with Gristede’s initial motion to dismiss, and that Plaintiff’s counsel responded by telephone and e-mail.¹

¹ This motion is substantially similar to a prior motion filed on April 8, 2011. *See Document No. 11 (April 8, 2011).* Due to Grande’s purported interest in obtaining new counsel, and at the request of the Court, Gristede’s withdrew its prior motion “without prejudice and with leave to renew.” *See Document No. 15 (May 31, 2011).* Pursuant to the July 11, 2011 Court conference, Gristede’s has added Plaintiff’s failure to prosecute this action as a ground for Gristede’s motion.

Dated: New York, New York
July 29, 2011

Respectfully submitted,

SEDGWICK LLP

By: s/ Charles H. Kaplan
Charles H. Kaplan (CK-5801)
William J. Brennan (WB-0742)
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Attorneys for Defendant Gristede's Foods, Inc.

TO: Mr. Joseph Grande
59 Bennett Road
Matawan, New Jersey 07747

CERTIFICATE OF SERVICE

I hereby certify that this document, filed through the ECF system, will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants, including Joseph Grande, on July 29, 2011. Executed on July 29 2011.

s/ Charles H. Kaplan
Charles H. Kaplan (CK-5801)

ATTORNEY'S CERTIFICATION OF SERVICE BY OVERNIGHT DELIVERY

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

CHARLES H. KAPLAN, the undersigned attorney at law admitted to practice in the United States District Court for the Southern District of New York, hereby affirms: that he is over 18 years of age; is not a party to this action; and is a member of the law firm of Sedgwick LLP, 125 Broad Street, 39th Floor, New York, New York 10004.

That on July 29, 2011, he caused to be served the attached

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BY DEFENDANT GRISTEDE'S FOODS, INC.**

upon the following party at the address designated by him for that purpose:

Mr. Joseph Grande
59 Bennett Road
Matawan, New Jersey 07747

Said service was made by depositing true copies of the attached papers enclosed in sealed wrappers, properly addressed to the above-named attorneys, into the custody within the State of New York of an overnight delivery service, Federal Express, for overnight delivery, prior to the latest time designated by Federal Express for overnight delivery.

CHARLES H. KAPLAN declares under penalty of perjury, pursuant to 28 U.S.C. § 1746, that the foregoing is true and correct. Executed on July 29, 2011.

s/ Charles H. Kaplan
CHARLES H. KAPLAN (CK-5801)